IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

Greg Stewart and Stillman Stewart; Lisa Blakey and Janet Rodriguez; and Todd Vesely and Joel Busch, Plaintiffs, v. Dave Heineman, in his official capacity as Governor of Nebraska; Kerry Winterer, in his official capacity as the Chief Executive Officer of the Nebraska Department of Health and Human Services; and Thomas Pristow, in his official capacity as Director of the Nebraska Division of Children and Family Services, Defendants.	)	Case No. CI 13-3157

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND
IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

March 6, 2015

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Plaintiffs Greg Stewart and Stillman Stewart, Lisa Blakey and Janet Rodriguez, and Todd Vesely and Joel Busch (collectively, "Plaintiffs") respectfully submit this memorandum of law in support of their motion for summary judgment, brought pursuant to Nebraska Revised Statutes § 25-1331 and Rule 3-6(A) of the Rules of the District Court for the Third Judicial District, and in opposition to Defendants' motion for summary judgment, dated February 13, 2015.

PRELIMINARY STATEMENT

Defendants Kerry Winterer and Thomas Pristow, on behalf of Nebraska's Department of Health and Human Services ("HHS"), have admitted that "Administrative Memorandum – Human Services – #1-95" (the "Policy") serves *no* child welfare interest or any State interest whatsoever. Rather, the Policy harms children in State care by categorically excluding applicants "who identify themselves as homosexuals" or are "unrelated, unmarried adults residing together" from serving as foster or adoptive parents, who, HHS further admits, are just as likely as heterosexuals to be good parents to the children who need them. Indeed, because of the State's comprehensive process to screen out unfit applicants, the Policy serves only to exclude suitable parents. The Policy therefore exacerbates the serious shortage of adoptive and foster parents in this State, harming children in the State's welfare system by denying children loving homes, causing children to be placed in emergency shelters or group homes, bouncing children from placement to placement and separating siblings, and forsaking some children to age out of foster care without ever being part of a permanent family.

Perhaps because the Policy harms children in State care, Defendants do not attempt to defend or justify the Policy (or the concept that gay or lesbian applicants should be treated differently in the foster care and adoption licensing and placement process). (Brief in

Support of Defendants' Motion for Summary Judgment, dated Feb. 13, 2015 ("Def. Br."), at 6-11.) Instead, despite HHS's admissions during discovery that the Policy is in fact still active, Defendants now claim that the Policy "is not the policy of []HHS" and assert that "gay and lesbian applicants are treated by []HHS exactly the same way as heterosexual applications." (Def. Br. at 6, 9.) The record evidence reveals that these assertions are plainly incorrect. Ironically, if these assertions were in fact true, Plaintiffs would have achieved all that they seek in this action.

Although Defendants never rescinded the Policy, in the summer of 2012, the then-Director of the Division of Children and Family Services ("CFS"), Defendant Thomas Pristow, developed a procedure to make exceptions to the Policy (the "Pristow Procedure"). The Pristow Procedure would allow HHS to place children with individuals who live with a same-sex partner and/or identify as homosexual, provided that such placements are personally approved by Defendant Pristow—a more burdensome process than that applied to heterosexual applicants, including those who are convicted felons. To implement this procedure, Defendant Pristow verbally informed only a handful of high-level employees within CFS of the Pristow Procedure, and then relied on the change to be communicated within HHS—and to contract agencies that recruit and train foster parents—only by word-of-mouth (and never communicated systematically or reduced to an appropriate writing). At the same time, however, the Policy itself remained active, was still listed among the current policy memoranda on HHS's website, and included in the training materials received by HHS staff. This half-hearted change in practice created widespread confusion within HHS as to the application of the still active Policy and some staff, unware of the Pristow Procedure, have continued to apply the Policy.

The Policy and, even if it were uniformly applied, the Pristow Procedure subject lesbian and gay individuals and couples to unequal treatment on the basis of both their sexual orientation and intimate relationships. Heightened scrutiny is warranted because (i) this burdens a fundamental right or liberty interest protected by substantive due process, and (ii) classifications based on sexual orientation are at least quasi-suspect. However, this treatment cannot withstand any level of constitutional scrutiny.

Plaintiffs therefore request that the Court (i) enjoin Defendants and those acting in concert with them from enforcing the Policy or following the Pristow Procedure; and (ii) order Defendants to evaluate applications of gay and lesbian individuals and couples seeking to serve as foster or adoptive parents consistently with the evaluation process applied to heterosexual applicants.

STATEMENT OF UNDISPUTED FACTS[1]

A. The Plaintiffs

1. Plaintiffs are three same-sex couples who seek to apply in Nebraska to be foster parents under the same process applied to heterosexual couples. (Complaint and Praecipe ("Compl.")), ¶¶ 41-70 (attached hereto as Exhibit 1 to the Declaration of Garrard R. Beeney, dated Mar. 6, 2015 ("Ex.")); *id.* at 28.)

[1] Plaintiffs dispute the following paragraphs of Defendants' Statement of Facts: paragraph 6 insofar as it limits this action to a facial challenge of Administrative Memo #1-95 because Plaintiffs also challenge as unconstitutional HHS's practice as applied; paragraph 15 (*see* Plaintiffs' Statement of Undisputed Facts ("SOF") ¶ 6); paragraph 16 (*see* SOF ¶¶ 39, 16-18, 5-6, 54); paragraph 20 (*see* SOF ¶¶ 29, 38-58); paragraph 21 (*see* SOF ¶¶ 39, 54-68); paragraph 22 (*see* SOF ¶¶ 39, 54-68); paragraph 23 (*see* SOF ¶¶ 29-37, 54); paragraph 25 (*see* SOF ¶¶ 37-52, 5-6, 54-68); paragraph 26 (*see* SOF ¶¶ 38-58); and paragraph 27 (*see* SOF ¶¶ 38-58).

2. Plaintiffs Greg and Stillman Stewart have been in a committed relationship for over 30 years and legally married in the State of California in 2008. (Def. Br., Statement of Facts ("Def. SOF") ¶ 8.)

3. Plaintiffs Lisa Blakey and Janet Rodriguez have been in a committed relationship for over eight years. (Def. SOF ¶ 10.)

4. Plaintiffs Todd Vesely and Joel Busch have been in a committed relationship for over nine years. (Def. SOF ¶ 12.)

5. In July 2008, Todd Vesely and Joel Busch applied to become foster parents and completed training, underwent a home study, and passed the required background checks. (Def. SOF ¶ 13.)

6. In June 2010, Todd Reckling, who at the time was the Director of CFS, wrote to inform Todd Vesely and Joel Busch of HHS's placement policy giving preference to married couples or single individuals with narrow exceptions for unmarried unrelated adults, usually where one of the adults is a relative of the child being placed. (Ex. 2 (Letter from Todd Reckling to Joel Busch and Todd Vesely, dated June 15, 2010).)[2] After sending a letter requesting clarification as to HHS's policy (Ex. 3 (Letter from Amy Miller, ACLU Nebraska, to Kerry Winterer, dated Nov. 4, 2011)), Kerry Winterer, the Chief Executive Officer of HHS, responded that HHS applies the "[b]est interests of the specific child or children" standard when making

[2] As noted in footnote 1, *supra*, Defendants mischaracterize this letter in paragraph 15 of their Statement of Facts. In June 2010, Todd Reckling, the Director of HHS's Division of Children and Family Services, wrote and informed Todd and Joel of HHS's policy barring *any* licensing of unrelated adults living together with exceptions given in a very narrow set of circumstances, not just *joint* licensing. (Ex. 2 (Letter from Todd Reckling to Joel Busch and Todd Vesely, dated June 15, 2010).)

placement decisions and, at the same time, that "Policy Memorandum # 1-95 is still in force" (Ex. 4 (Letter from Kerry Winterer to Amy Miller, ACLU Nebraska, dated Nov. 28, 2011).

B. The Defendants

7. Defendant Dave Heineman was the Governor of the State of Nebraska at the time of the filing of this lawsuit and, in that capacity, appointed the HHS Chief Executive Officer. (Ex. 1 (Compl.), ¶ 71; Ex. 5 (Answer ("Ans.")), ¶ 32.)

8. Defendant Kerry Winterer was the Chief Executive Officer of HHS at the time of the filing of this lawsuit. (Def. SOF ¶ 3.)

9. HHS has "legal custody of all children committed to it" and "shall afford temporary care and shall use special diligence to provide suitable homes for such children." (Def. SOF ¶ 1 (quoting Neb. Rev. Stat. § 43-905).)

10. Within HHS, CFS is responsible for Nebraska's child welfare, juvenile services and economic assistance plans, including HHS's foster care and adoption program. (Def. SOF ¶ 2.)

11. Defendant Thomas Pristow was the Director of CFS at the time of the filing of this lawsuit. (Def. SOF ¶ 4.)

12. On March 7, 2012, Thomas Pristow was named the Director of CFS and, on March 21, 2012, he began his duties in that capacity. (Ex. 6 (Pristow 30(b)(6) Dep.), at 8:23-24; Ex. 17 (Press Release, HHS, Thomas Pristow Named DHHS Director of Children and Family Services (Mar. 7, 2012), http://dhhs.ne.gov/Pages/Newsroom_Newsreleases_2012_March_CFS_Director.aspx).)

13. Kerry Winterer recently resigned from his post, and Thomas Pristow was not to be retained by Governor Ricketts. (*See* Ex. 18 (Paul Hammel, *Gov.-elect Ricketts to Replace at Least Two State HHS Division Heads*, Omaha World-Herald, Dec. 17, 2014).)

C. The HHS Policy Prohibiting Foster or Adoptive Placements with Gay and Lesbian Couples and Individuals

14. The Policy was issued on January 23, 1995 by the then-Director of the Nebraska Department of Social Services ("NDSS"). (Ex. 19 (the Policy); Ex. 20 (Defendants' Responses to Plaintiffs' First Set of Interrogatories), at 2; Ex. 7 (Winterer 30(b)(6) Dep.), at 62:9-63:5.)

15. NDSS was reorganized into HHS in 1996. (*See*, *e.g.*, Ex. 21 (Nebraska Health and Human Services System Chronological History, http://nlc.nebraska.gov/govdocs/hhsshistory2-01.pdf); Ex. 16 (Stolz Dep.), at 118:7-12.)

16. By its express terms, the Policy prohibits HHS from issuing foster home licenses to, or placing children in foster homes with, either: (1) "persons who identify themselves as homosexuals" or (2) persons who are "unrelated, unmarried adults residing together." (Ex. 19 (the Policy).)

17. Gay and lesbian couples are deemed unmarried for the purposes of the Policy, even if they married in another jurisdiction, because Nebraska law bars recognition of marriages of same-sex couples. (Ex. 6 (Pristow 30(b)(6) Dep.), at 20:12-19; Ex. 7 (Winterer 30(b)(6) Dep.), at 55:4-12; Ex. 8 (Maca Dep.) at 35:14-17.)

18. The Policy also categorically prohibits gay and lesbian individuals and couples from adopting non-kin children from state custody because, before individuals may adopt children from state care, they must first be licensed foster parents. (Ex. 19 (the Policy); Ex. 9 (Green Dep.), at 39:5-12.)

D. HHS Admits It Has No State Interest in Treating Lesbian and Gay Individuals and Couples Differently in the Foster Care and Adoption Process.

19. No Nebraska state interest is advanced by treating gay or lesbian persons differently from heterosexual persons in decisions involving licensing or placement of children in foster or adoptive homes. (Ex. 6 (Pristow 30(b)(6) Dep.), at 11:22-12:3.)

20. No Nebraska state interest is advanced by treating unmarried adults differently from married adults in decisions involving licensing or placement in foster or adoptive homes. (Ex. 6 (Pristow 30(b)(6) Dep.), at 12:4-14.)

21. No child welfare interest is advanced by treating gay and lesbian persons differently from heterosexual persons in decisions regarding licensing or placement in foster or adoptive homes. (Ex. 6 (Pristow 30(b)(6) Dep.), at 10:11-11:11, 13:11-16; *see also id.* at 19:24-20:8 ("nothing is advanced" by having a separate process for gay and lesbian applicants); Ex. 11 (Bryceson Dep.), at 170:24-171:5; Ex. 10 (Busch Dep.), at 80:15-20; Ex. 9 (Green Dep.), at 68:19-69:7; Ex. 8 (Maca Dep.), at 63:4-8; Ex. 14 (Puls Dep.), at 52:7-12; Ex. 15 (Silverman Dep.), at 79:4-9; Ex. 13 (Spilde Dep.), at 97:21-98:3; Ex. 12 (Steuter Dep.), at 75:25-76:5.)

22. A person's sexual orientation is irrelevant to whether they would make a suitable foster or adoptive parent. (Ex. 7 (Winterer 30(b)(6) Dep.), at 49:8-11, 61:22-62:8.)

23. Gay and lesbian persons can be equally suitable foster and adoptive parents as heterosexual individuals or couples. (Ex. 6 (Pristow 30(b)(6) Dep.) at 55:23-56:14 ("[T]here is no reason for [gay and lesbian people] not to be foster parents."); Ex. 7 (Winterer 30(b)(6) Dep.), at 109:4-13; Ex. 11 (Bryceson Dep.), at 172:8-13; Ex. 10 (Busch Dep.), at 86:13-16; Ex. 16 (Stolz Dep.), at 239:19-25.)

24. There is a consensus in the scientific literature that there is no difference in outcomes for children placed with same-sex couples as compared with children placed with heterosexual couples. (Ex. 6 (Pristow 30(b)(6) Dep.), at 55:23-56:4.)

25. HHS is aware of and has no basis to disagree with research showing that there is no difference in outcome for children placed with same-sex couples as compared to children placed with heterosexual couples. (Ex. 6 (Pristow 30(b)(6) Dep.), at 56:6-14; Ex. 7 (Winterer 30(b)(6) Dep.), at 97:18-23, 98:4-7.)

26. In some cases, an individual who lives with a same-sex partner and/or identifies as homosexual may be the best placement match available for a particular child. (Ex. 7 (Winterer 30(b)(6) Dep.), at 111:13-20; 142:20-143:2.)

27. The Policy does not promote or protect the well-being of children in any way. (Ex. 11 (Bryceson Dep.), at 171:7-10; Ex. 10 (Busch Dep.), at 80:22-25; Ex. 9 (Green Dep.), at 128:9-13; Ex. 8 (Maca Dep.), at 119:19-23; Ex. 13 (Spilde Dep.), at 111:9-12.)

28. A policy that discourages persons who identify as homosexual from applying to foster or adopt would be contrary to the best interests of children. (Ex. 6 (Pristow 30(b)(6) Dep.), at 42:7-12; Ex. 7 (Winterer 30(b)(6) Dep.), at 105:2-12; Ex. 9 (Green Dep.), at 144:24-145:5; Ex. 8 (Maca Dep.), at 125:11-17.)

E. Former Director Pristow's Procedure

29. In the summer of 2012, Director Pristow verbally informed the HHS Service Area Administrators and the Deputy Director that HHS may place children with individuals who live with a same-sex partner and/or identify as homosexual, provided that such placements are personally approved by the Director of CFS (the "Pristow Procedure"). (Ex. 6 (Pristow 30(b)(6) Dep.), at 33:18-35:10; Ex. 8 (Maca Dep.), at 85:13-86:20; Ex. 14 (Puls Dep.), at 21:10-24.)

30. Under the Pristow Procedure, individuals who live with a same-sex partner and/or identify as homosexual are the only applicants who are subject to Director-level review in order to be approved. (Ex. 6 (Pristow 30(b)(6) Dep.), at 51:11-14; Ex. 8 (Maca Dep.), at 52:7-12; Ex. 16 (Stolz Dep.), at 42:15-23; *see also* Ex. 22 (Email from Marylyn Christenson to Rachael Kallhoff, Building Blocks (July 18, 2012, 17:12 CST) (0376) ("As far as [foster] placement [for a same sex couple] . . . I do know that approval from the Director is required before placement.")); Ex. 23 (Email from Thomas Pristow to Mike Puls (May 16, 2013, 12:33 CST) (0211) ("[I]f they are openly gay it has to come to me . . . .")); Ex. 24 (Email from Kathleen Stolz to Sara Goscha (Feb. 8, 2013, 12:19 CST) (0244) (same-sex couple was "the only request that we have sent to Thomas. All other (just unmarried – living together) have been approved at the Service Area level per policy sent by Nathan Busch.")).)

31. The Pristow Procedure is not based on any concern about the suitability of such individuals to be foster or adoptive parents or the well-being of the children in their care. (Ex. 6 (Pristow 30(b)(6) Dep.), at 19:17-20:19; *see also id.* at 19:8-22:15; Ex. 11 (Bryceson Dep.), at 172:22-173:4; Ex. 10 (Busch Dep.), at 86:25-87:8; Ex. 9 (Green Dep.), at 68:13-17; Ex. 8 (Maca Dep.), at 61:25-62:9; Ex. 14 (Puls Dep.), at 51:25-52:5; Ex. 15 (Silverman Dep.), at 80:11-17; Ex. 13 (Spilde Dep.), at 96:11-15; Ex. 12 (Steuter Dep.), at 75:6-9; Ex. 16 (Stolz Dep.), at 240:3-8.)

1. HHS Requires Two Tiers of Approval for Foster Care Placements with Heterosexual Married or Single Applicants.

32. HHS requires only *two* tiers of review for approval of foster care placements with married, opposite-sex couples or single individuals who do not identify as homosexual (and are not convicted felons). When a caseworker makes an assessment and recommends such a placement, the caseworker consults with a Supervisor, and together the caseworker and her

Supervisor can approve or reject the placement. No other approval is required. (*See* Ex. 6 (Pristow 30(b)(6) Dep.), at 14:12-15:8, 16:8-14; Ex. 7 (Winterer 30(b)(6) Dep.), at 19:24-20:4; Ex. 9 (Green Dep.), at 58:3-15; Ex. 8 (Maca Dep.), at 41:20-42:23.)

2. The Pristow Procedure Requires Four Tiers of Approval for Foster Care Placements with Unmarried, Opposite-Sex Couples and Individuals with Past Felony Convictions.

33. The Pristow Procedure requires *four* tiers of review for approval of foster care placements with unrelated, unmarried individuals who reside together who are not a same-sex couple. When a caseworker makes an assessment and recommends such a placement, the caseworker consults with a Supervisor, and together they can decide whether to recommend or reject the placement. If placement is recommended, it is submitted to the HHS Administrator for approval or rejection. If the recommended placement is approved by the Administrator, it is submitted to the Service Area Administrator for approval or rejection. If the Service Area Administrator approves the placement, it can be made. (*See* Ex. 6 (Pristow 30(b)(6) Dep.), at 14:12-15:8, 16:15-20, 51:24-52:4; Ex. 9 (Green Dep.), at 54:15-56:20; Ex. 8 (Maca Dep.), at 50:12-51:24, 146:8-147:23; Ex. 14 (Puls Dep.), at 17:12-18:4, 49:25-50:6; Ex. 13 (Spilde Dep.), at 95:17-22; Ex. 16 (Stolz Dep.), at 24:19-25:8; *see also* Ex. 25 (Email from Nathan Busch to Mike Puls et al. (Nov. 7, 2012, 17:11 CST) (0568) ("An exception for placement with unmarried / unrelated adults can be granted by the Service Area Administrator.")); Ex. 23 (Email from Thomas Pristow to Mike Puls (May 16, 2013, 9:27 CST) (0211) ("You're the approval level for non related adults. Your call.")); Ex. 24 (Email from Kathleen Stolz to Sara Goscha (Feb. 8, 2013, 12:19 CST) (0244) (same-sex couple was "the only request that we have sent to Thomas. All other (just unmarried – living together) have been approved at the Service Area level per policy sent by Nathan Busch.")).)

34. When a caseworker makes an assessment and recommends placing a child with an individual who has a past felony conviction (other than individuals convicted of certain child abuse and domestic violence crimes, which are barriers to approval), the same *four* tiers of HHS approval apply as in the case of unrelated, unmarried heterosexuals who reside together. (Ex. 6 (Pristow 30(b)(6) Dep.), at 51:15-52:4; Ex. 7 (Winterer 30(b)(6) Dep.), at 19:24-22:24, 76:20-78:6; Ex. 9 (Green Dep.), at 54:15-56:12; Ex. 8 (Maca Dep.), at 41:8-15, 51:25-52:6, 52:12-53:4, 74:11-25.)

3. The Pristow Procedure Requires Five Tiers of Approval for Foster Care Placements with Gay or Lesbian Individuals and Couples.

35. The Pristow Procedure requires *five* tiers of review for approval of foster care placements with gay or lesbian individuals and couples. When a caseworker makes an assessment and recommends such a placement, the caseworker consults with a Supervisor, and together they determine whether to recommend placement. If placement is recommended, it is submitted to the HHS Administrator for approval or rejection. If the recommended placement is approved by the Administrator, it is submitted to the Service Area Administrator for approval or rejection. If the recommended placement is approved by the Service Area Administrator, it is submitted to the Director of CFS for approval or rejection. In order for the placement with an individual who lives with a same-sex partner and/or identifies as homosexual to proceed, each of the individuals above must approve the placement. (*See* Ex. 6 (Pristow 30(b)(6) Dep.), at 13:23-14:8, 16:8-17:7; Ex. 7 (Winterer 30(b)(6) Dep.), at 42:7-43:1, 44:18-25; Ex. 9 (Green Dep.), at 54:25-55:21; Ex. 8 (Maca Dep.), at 50:12-21; Ex. 14 (Puls Dep., at 17:12-18:4; Ex. 15 (Silverman Dep.), at 69:10-13; Ex. 13 (Spilde Dep.), at 95:17-22; Ex. 16 (Stolz Dep.), at 24:19-26:20.)

36. The Director is only informed of potential placements with individuals who live with a same-sex partner and/or identify as homosexual if the placement is approved at all prior levels. (Ex. 6 (Pristow 30(b)(6) Dep.), at 17:16-18.)

37. If a proposed placement with an individual who lives with a same-sex partner and/or identifies as homosexual is rejected by a caseworker, Supervisor, Administrator, or Service Area Administrator, it is not brought to the attention of the Director. (Ex. 6 (Pristow 30(b)(6) Dep.), at 17:16-18.)

F. The Policy Is a Continuing Barrier to Foster or Adoptive Placements with Gay and Lesbian Couples and Individuals.

1. The Pristow Procedure Has Not Been Placed in Writing or Otherwise Systematically Communicated to HHS Staff, Resulting in Confusion and Inconsistent Treatment of Lesbian and Gay Applicants.

38. When an administrative memorandum setting forth HHS policy should no longer be followed by HHS staff,[3] HHS typically rescinds or amends the administrative memorandum, informs HHS staff in writing of the change and removes the rescinded administrative memorandum from the website. (*See* Ex. 9 (Green Dep.), at 88:20-24; Ex. 16 (Stolz Dep.), at 159:20-160:21.)

39. Since the time of its enactment, the Policy has not been rescinded or replaced, and the Policy remains HHS's formal policy concerning licensure of and placements of children in state care with lesbian and gay individuals and couples. (Ex. 5 (Ans.), ¶ 19; *see also* Ex. 6 (Pristow 30(b)(6) Dep.), at 33:15-16; Ex. 7 (Winterer 30(b)(6) Dep.), at 63:12-66:22; Ex. 9 (Green Dep.), at 84:16-19; Ex. 8 (Maca Dep.), at 75:8-13; Ex. 14 (Puls Dep.), at 31:7-23; Ex. 13

[3] "HHS staff" and "employees of HHS" refer to all employees of HHS who report directly or indirectly to the Chief Executive Officer of HHS, formerly Kerry Winterer, and the Director of CFS, formerly Thomas Pristow, and are involved in the foster care and adoption licensing and/or placement process.

(Spilde Dep.), at 49:19-23 ("It's still an administrative memo, and it's still in effect."); Ex. 16 (Stolz Dep.), at 38:9-18 ("It is currently an administrative memo that is still active; therefore it's still policy."); *see also* Ex. 25 (Email from Nathan Busch to Mike Puls et al. (Nov. 7, 2012, 17:11 CST) (0568)) ("[The Policy] is still active and has not been rescinded."); Ex. 26 (Email from Chris Hanus to Margaret Bitz (July 13, 2012, 13:18 CST) (0349-50)) ("The [Policy] is still active.").)

40. The Policy is the only formal writing purporting to describe current HHS policy with respect to licensing of or placements of children with applicants who live with a same-sex partner and/or identify as homosexual. (Ex. 6 (Pristow 30(b)(6) Dep.), at 33:18-34:12; Ex. 7 (Winterer 30(b)(6) Dep.), at 69:9-70:1; Ex. 10 (Busch Dep.), at 35:22-24; Ex. 8 (Maca Dep.), at 78:13-19, 82:5-17; Ex. 14 (Puls Dep.), at 56:7-11.)

41. The Policy was posted on HHS's website on the page displaying current administrative and policy memos until HHS removed it from its website in February 2015. (Ex. 27 (Joanne Young, *Senators Seek Clarity on HHS Policy Against Gay Foster Parents*, Lincoln Journal Star, Mar. 2, 2015); Ex. 6 (Pristow 30(b)(6) Dep.), at 30:8-31:20, 33:15-16, 40:3-4 ("The memo is still on the website and it's still in play. . . . There is nothing on the website that would indicate that that's no longer policy.").)

42. The Policy does not appear on the HHS website page displaying rescinded or replaced memos. (Ex. 28 (HHS, CFS Archived Administrative & Policy Memos, http://dhhs.ne.gov/children_family_services/Pages/jus_am_archive.aspx).)

43. There is no indication on HHS's website that (i) the Policy is not enforced as written; (ii) children may be placed with an individual who lives with a same-sex partner and/or identifies as homosexual; or (iii) any applications to foster or adopt a child will be considered by

HHS if such application is submitted by an individual who lives with a same-sex partner and/or identifies as homosexual. (*See* Ex. 6 (Pristow 30(b)(6) Dep.), at 30:8-31:20, 33:15-16, 40:3-4 ("The memo is still on the website and it's still in play. . . . There is nothing on the website that would indicate that that's no longer policy."); Ex. 7 (Winterer 30(b)(6) Dep.), at 91:3-14; Ex. 13 (Spilde Dep.), at 49:19-23; Ex. 12 (Steuter Dep.), at 41:14-42:11.)

44. When Director Pristow informed the HHS Service Area Administrators and the Deputy Director of the Pristow Procedure, HHS staff did not receive anything in writing communicating this change in practice. (Ex. 6 (Pristow 30(b)(6) Dep.), at 31:21-33:4, 33:18-35:10; Ex. 7 (Winterer 30(b)(6) Dep.), at 68:13-25, 69:13-70:1; Ex. 10 (Busch Dep.), at 22:25-23:19, 35:22-24; Ex. 8 (Maca Dep.), at 82:5-17, 85:6-90:1; Ex. 14 (Puls Dep.), at 56:7-11, 21:10-24.)

45. No writing communicating the Pristow Procedure has ever been disseminated to HHS staff. (Ex. 6 (Pristow 30(b)(6) Dep.), at 33:18-35:10; 34:2-12; Ex. 7 (Winterer 30(b)(6) Dep.), at 69:9-70:1, 93:23-94:3; Ex. 10 (Busch Dep.), at 22:25-23:8, 35:22-24; Ex. 8 (Maca Dep.), at 78:13-19, 82:5-17; Ex. 14 (Puls Dep.), at 56:7-11.)

46. When Mr. Pristow informed the HHS Service Area Administrators and the Deputy Director of the Pristow Procedure, Mr. Pristow only informed them verbally. (Ex. 6 (Pristow 30(b)(6) Dep.), at 33:18-35:10; Ex. 7 (Winterer 30(b)(6) Dep.), at 68:13-70:1; Ex. 8 (Maca Dep.), at 85:13-86:20; Ex. 14 (Puls Dep.), at 21:10-24.)

47. When Mr. Pristow verbally informed the HHS Service Area Administrators and the Deputy Director of the Pristow Procedure, remaining HHS staff were expected to learn of this change in practice without the benefit of a written memorandum, and only in the event that the issue arises in the course of their work and they inquire with their supervisors about the

practice. (*See* Ex. 6 (Pristow 30(b)(6) Dep.), at 31:21-33:4, 43:18-22; Ex. 7 (Winterer 30(b)(6) Dep.), at 68:13-70:1; Ex. 10 (Busch Dep.), at 99:15-100:25; Ex. 8 (Maca Dep.), at 78:24-80:21, 82:5-17.)

48. No process is in place to ensure that all HHS staff, including new hires, are informed of the Pristow Procedure. (Ex. 6 (Pristow 30(b)(6) Dep.), at 38:16-39:20, 43:18-22; Ex. 7 (Winterer 30(b)(6) Dep.), at 68:13-70:1; Ex. 8 (Maca Dep.), at 84:6-11; Ex. 14 (Puls Dep.), at 26:23-27:12; Ex. 12 (Steuter Dep.), at 42:4-14.)

49. The Policy is included in the materials provided to HHS staff during training. (Ex. 6 (Pristow 30(b)(6) Dep.), at 30:8-31:20; Ex. 7 (Winterer 30(b)(6) Dep.), at 67:15-20.)

50. During training, HHS staff are encouraged to review all of the administrative policies on HHS's website. (*See* Ex. 9 (Green Dep.), at 89:23-90:5; Ex. 8 (Maca Dep.), at 82:23-83:4.)

51. HHS staff receive no formal training with respect to reviewing applicants who live with a same-sex partner and/or identify as homosexual. (Ex. 6 (Pristow 30(b)(6) Dep.), at 31:21-33:4, 38:18-39:20, 43:18-22; Ex. 7 (Winterer 30(b)(6) Dep.), at 68:13-69:8, 69:13-70:1; Ex. 10 (Busch Dep.), at 23:9-19, 99:15-25; Ex. 9 (Green Dep.), at 20:14-22:6; Ex. 8 (Maca Dep.), at 78:13-80:21, 84:6-11; Ex. 14 (Puls Dep.), at 27:4-12.)

52. The fact that placements can be made with individuals who live with a same-sex partner and/or identify as homosexual subject to the CFS Director's approval is not a part of any formal training HHS provides to its staff. (Ex. 6 (Pristow 30(b)(6) Dep.), at 31:21-33:4, 38:18-39:20, 43:18-22; Ex. 10 (Busch Dep.), at 23:9-19, 99:15-25; Ex. 8 (Maca Dep.), at 84:6-11.)

53. After Director Pristow verbally informed the HHS Service Area Administrators and the Deputy Director of the Pristow Procedure, employees of HHS have expressed confusion

over what HHS policy is with respect to placing children with an individual who lives with a same-sex partner and/or identifies as homosexual, and some have expressed their belief that the Policy still reflects HHS policy and practice. (*See* Ex. 10 (Busch Dep.), at 30:23-34:24, 67:21-68.2; Ex. 8 (Maca Dep.), at 90:24-92:15; Ex. 14 (Puls Dep.), at 53:3-10; Ex. 12 (Steuter Dep.), at 76:25-77:6; Ex. 16 (Stolz Dep.), at 158:4-162:6; Ex. 26 (Email from Margaret Bitz to Chris Hanus (July 13, 2012, 13:04 CST) (0349-50) ("What I'm not sure of is whether there is still a requirement for approval of PLACEMENTS [with same-sex couples] by the Director . . . . [W]e also didn't say that the 1995 memo was rescinded.")); Ex. 29 (Email from Cynthia Bremer to Marylyn Christenson (Nov. 27, 2012, 15:16 CST) (0281) ("I would just make her aware that memo which clarifies the policy has not been rescinded so she is aware it is basically against policy at this point."); Ex. 30 (Email from Marylyn Christenson to KaCee Zimmerman (Nov. 21, 2012, 17:27 CST) (0282) ("Perhaps no one has clearly explained to me how we can license a [same-sex couple's] home when this memo is still in effect.")); Ex. 31 (Email from Marylyn Christenson to KaCee Zimmerman & Kathleen Stolz (Nov. 5, 2012 09:38 CST) (0329) ("It's been confusing to follow how they are handling that memo."); Ex. 32 (Email from Marylyn Christenson to Kathleen Stolz (Nov. 2012) (0286) ("I assumed [the Policy] was still in force since it's on the website.")); Ex. 22 (Email from Marylyn Christenson to Rachael Kallhoff, Building Blocks (July 18, 2012, 17:12 CST) (0376) ("As far as [foster] placement [for a same-sex couple], I still don't have clarity on that question . . . .")); Ex. 33 Email from Bob Furr to Marylyn Christenson (June 29, 2012, 8:36 CST) (0302) ("While I may agree that the 1-95 policy memo needs to be changed I and any contractor needs to follow that memo until that policy is changed.")); Ex. 34 (Email from Julie Pham to Nathan Busch (June 4, 2013, 13:12 CST) (0386) ("Is [1-95] still the current policy or has it been rescinded?")); Ex. 35 (Email from Lara Novacek

to Kathleen Stolz (Jan. 29, 2013, 19:07 CST) (0619-20) (asking whether placement with a same-sex couple was acceptable)); Ex. 36 (Email from Kathleen Stolz to Nathan Busch (Dec. 7, 2012, 11:44 CST) (0275-66) ("Okay Nathan, be patient with me as I try to get clarity on this Admin memo on behalf of my staff.")); Ex. 37 (Email from Joy Walkowiak to Marylyn Christenson (Oct. 19, 2012, 11:39 CST) (0288-89) (requesting clarification on licensing same-sex couples)); *cf.* Ex. 38 (Email from Lindy Bryceson to Vicki Maca (Sept. 17, 2012, 19:17 CST) (0570) ("Can we have a brief time on Thursday to agree on whether or not unmarried unrelated adult exceptions are to come to the central office. We are doing this differently across the state. . . . The current policy memo is not clear on this issue.")).)

54. In October 2012, after Director Pristow verbally informed the HHS Service Area Administrators and the Deputy Director of the Pristow Procedure, plaintiffs Greg and Stillman Stewart contacted HHS to inquire about obtaining a foster home license and were told they could not obtain a license because same-sex couples are barred from becoming licensed under the Policy. (Ex. 1 (Compl.), ¶ 50.)

55. From July 2013 through August 2014, three out of the five service areas in Nebraska placed zero children with individuals who live with a same-sex partner and/or identify as homosexual. (Ex. 39 (Placement Exceptions by Director, July 2013-August 2014, Aug. 6, 2014 (0917)); Ex. 8 (Maca Dep.), at 156:10-157:3.)

56. Because the Policy has not been rescinded, two HHS employees (Marylyn Christenson and Cynthia Bremer) who have expressed personal objections to placing children with gay people, have used the Policy as a means to exclude potential gay and lesbian applicants. (Ex. 16 (Stolz Dep.), at 63:12-64:18, 66:9-14, 68:4-14; 175:20-176:12; 220:14-221:6; Ex. 32 (Email from Marylyn Christenson to Kathleen Stolz (Nov. 4, 2012 22:40 CST) (0286)) ("I

assumed [the Policy] was still in force since it's on the website.")); Ex. 29 (Email from Cynthia Bremer to Marylyn Christenson (Nov. 27, 2012, 15:16 CST) (0281) ("I would just make her aware that memo which clarifies the policy has not been rescinded so she is aware it is basically against policy at this point.")); Ex. 30 (Email from Marylyn Christenson to KaCee Zimmerman (Nov. 21, 2012, 17:27 CST) (0282) ("Perhaps no one has clearly explained to me how we can license [same-sex couple's] home when this memo is still in effect.")); Ex. 33 (Email from Bob Furr to Marylyn Christenson (June 29, 2012, 8:36 CST) (0302) ("While may agree that the 1-95 policy memo needs to be changed I and any contractor needs to follow that memo until that policy is changed.")).)

57. On September 13, 2012, Ms. Christenson, whose responsibilities as a contract monitor include informing contract agencies of HHS policy (Ex. 16 (Stolz Dep.), at 202:12-14), wrote an email to her Service Area Administrator, Kathleen Stolz, explaining that she planned to inform the "Screen Team," a group of contract agencies and the NFAPA, which fields calls from potential applicants, that she would not approve a same-sex couple's home to be licensed (Ex. 16 (Stolz Dep.), at 206:20-208:12; Ex. 40 (Email from Marylyn Christenson to Kathleen Stolz (Sept. 13, 2012, 15:57 CST) (0331-32))).

58. Moreover, under Marylyn Christenson's supervision, the resource development staff in the Western Service Area placed gay and lesbian applicants "on hold," a designation indicating that children could not be placed in the home because of, for example, investigations into abuse or neglect or the family not wanting more children at the time. (*See* Ex. 16 (Stolz Dep.), at 124:5-128:25; 130:21-132:19.) The Western Service Area Administrator admitted that the hold could act as a disincentive for placement with that household. (Ex. 16 (Stolz Dep.), at 124:22-25.)

2. The Pristow Procedure Has Not Been Placed in Writing or Otherwise Systematically Communicated to Contract Agencies, Resulting in Confusion and Inconsistent Treatment of Lesbian and Gay Applicants.

59. HHS contracts with a number of private agencies to recruit and train foster parents ("Contract Agencies"). (*See* Ex. 8 (Maca Dep.), at 127:13-18; Ex. 14 (Puls Dep.), at 23:24-24:12.)

60. HHS has not informed the Contract Agencies in writing of the Pristow Procedure. (Ex. 6 (Pristow 30(b)(6) Dep.), at 34:2-12; Ex. 10 (Busch Dep.), at 23:9-19, 99:15-25.)

61. No process was put in place to ensure that Contract Agency staff, including new hires, are informed of the Pristow Procedure. (*See* Ex. 6 (Pristow 30(b)(6) Dep.), at 34:2-34:19; Ex. 10 (Busch Dep.), at 99:15-100:25; Ex. 9 (Green Dep.), at 150:17-21; Ex. 14 (Puls Dep.), at 17:4-11, 25:10-26:22, 27:13-28:14, 33:19-25.)

62. Contract agencies are informed of HHS's policies and protocols by accessing HHS's internal and external websites—both of which contained the Policy until February 2015—or HHS provides them with its policies when they are selected to become a provider. (*See* Ex. 13 (Spilde Dep.), at 55:3-22; *see also* Ex. 27 (Joanne Young, *Senators Seek Clarity on HHS Policy Against Gay Foster Parents*, Lincoln Journal Star, Mar. 2, 2015); Ex. 6 (Pristow 30(b)(6) Dep.), at 30:8-31:20, 33:15-16, 40:3-4 ("The memo is still on the website and it's still in play. . . . There is nothing on the website that would indicate that that's no longer policy.").)

63. After Director Pristow verbally informed the HHS Service Area Administrators and the Deputy Director of the Pristow Procedure, employees of Contract Agencies have expressed confusion over what HHS policy is with respect to placing children with an individual who lives with a same-sex partner and/or identifies as homosexual. (*See* Ex. 16 (Stolz Dep.), at 150:14-22; Ex. 12 (Steuter Dep.), at 78:3-23; Ex. 33 (Email from Bob Furr to Marylyn

Christenson (June 29, 2012, 08:36 CST) (302-04)); Ex. 41 (Email from Rachael Kallhoff, Building Blocks to Marylyn Christenson (July 12, 2012, 17:24 CST) (300-01)); Ex. 42 (Email from Thomas Pristow to Jessyca Vandercoy, Right Turn Program Director (Sept. 12, 2012, 08:07 CST) (0232-33)).)

3. The Policy Prevents or Deters Potential Applicants from Fostering or Adopting Children in State Care.

64. The Policy has been and continues to be a barrier to families becoming foster parents. (*See* Ex. 6 (Pristow 30(b)(6) Dep.), at 42:14-21; Ex. 7 (Winterer 30(b)(6) Dep.), at 119:10-120:14; Ex. 10 (Busch Dep.), at 91:15-22, 102:17-21; Ex. 8 (Maca Dep.), at 125:19-126:18, 136:18-137:8, 140:17-141:2.)

65. Until March 2, 2015, the existence of the Pristow Procedure has never been communicated or made available to the public. Even today, the details of the process involved in the Pristow Procedure have never been communicated or made available to the public. (*See* Ex. 6 (Pristow 30(b)(6) Dep.), at 30:8-15, 31:12-16, 33:15-16, 34:2-12, 40:3-4; Ex. 9 (Green Dep.), at 148:12-22; Ex. 14 (Puls Dep.), at 69:20-70:2; Ex. 12 (Steuter Dep.), at 86:8-11; Ex. 43 (Martha Stoddard, *Without Fanfare, Nebraska Lifts Ban on Gay People Being Foster Parents*, Omaha World Herald, Mar. 2, 2015).)

66. Members of the public are under the impression that state policy bars placement of children with gay and lesbian individuals and couples. (Ex. 44 (Email from Sarah Hjorth to Mike Puls and Thomas Pristow (Aug. 28, 2013, 18:32 CST) (0220) ("[T]he school in Stuart is upset that we placed [a child] with [a same-sex couple] in Stuart. They said that we are breaking the law by placing there and the principal is implying that he is going to start calling central office and also media etc."); Ex. 45 (Email from Kathie Osterman to Thomas Pristow *et al.* (Aug. 27, 2013, 14:01 CST) (0419-20) (describing a caller who had read an article about a policy

preventing same-sex couples from serving as foster parents and had threatened to call news stations about children being placed in same-sex foster homes)).)

67. That the Policy was on HHS's website until February 2015 and has not been rescinded could deter lesbian and gay individuals and couples from applying to serve as foster or adoptive parents. (Ex. 6 (Pristow 30(b)(6) Dep.), at 30:8-15, 31:12-16, 33:15-16, 39:21-40:12, 40:3-4, 42:14-21; Ex. 7 (Winterer 30(b)(6) Dep.), at 119:10-120:14; Ex. 10 (Busch Dep.), at 91:15-22 ("Because the existing policy, Memorandum 1-95, is on the public website, it could have a chilling effect in terms of who is willing to foster."); Ex. 11 (Bryceson Dep.), at 175:3-176:2; Ex. 9 (Green Dep.), at 145:14-20; Ex. 8 (Maca Dep.), at 125:18-126:18, 136:18-137:8; Ex. 14 (Puls Dep.), at 67:16-69:5; Ex. 13 (Spilde Dep.), at 49:19-23, 114:4-21; Ex. 15 (Silverman Dep.), at 93:12-94:23; Ex. 12 (Steuter Dep.), at 84:10-85:23; Ex. 16 (Stolz Dep.), at 242:23-246:3.)

68. While HHS made 15 placements with lesbian or gay individuals or couples from July 2013 through August 2014, all but three were individuals who already had a prior kinship relationship with the child. (Ex. 39 (Placement Exceptions by Director, July 2013-August 2014, Aug. 6, 2014 (0917)).)

69. Taylor Gage, a spokesperson for Governor Ricketts, has stated that the "[P]olicy hasn't changed," despite that HHS "has fallen out of compliance with it[.]" (Ex. 43 (Martha Stoddard, *Without Fanfare, Nebraska Lifts Ban on Gay People Being Foster Parents*, Omaha World Herald, Mar. 2, 2015).)

70. Given that implementation of the Policy can change with new leadership (*see* Ex. 16 (Stolz Dep.), at 40:18-43:12), once appointed, the next Director of HHS could decide to discontinue the Pristow Procedure and adhere to the Policy as written.

G. HHS's Current Screening Process for Heterosexual Applicants Is Effective and Would Be Effective If Applied to Gay and Lesbian Couples and Individuals.

71. Same-sex couples and individuals who identify as homosexual can be as effectively screened for suitability to foster as any other applicant through the same screening process that HHS applies to other applicants. (Ex. 6 (Pristow 30(b)(6) Dep.), at 50:15-51:10; Ex. 7 (Winterer 30(b)(6) Dep.), at 52:23-53:12; Ex. 9 (Green Dep.), at 50:22-51:2.)

72. There is nothing about an applicant's sexual orientation that requires that person to be treated differently from other applicants to foster or adopt a child. (Ex. 7 (Winterer 30(b)(6) Dep.), at 46:23-47:4.)

73. There would be no harm to children if gay individuals or couples were subject to the normal placement process rather than receiving extra levels of review. (Ex. 9 (Green Dep.), at 76:14-19.)

74. Under HHS's existing foster care licensing procedures, to obtain a foster care license, potential adoptive or foster parents must, among other things, complete an application, submit to a background check, a criminal evaluation, fingerprinting and a sexual abuse registry check, and attend a training program. (Ex. 7 (Winterer 30(b)(6) Dep.), at 15:21-16:6; Ex. 9 (Green Dep.), at 41:5-19.)

75. Each applicant for a foster care license must also submit to a home study, which is an in-depth examination of the placement and includes a walk-through of the home and a formal interview. The home study looks at, for example, the demographics of the home, who is living there, the size of the home, square footage of bedrooms, any other health, safety, and sanitation issues that relate to the physical home itself, the income of potential foster parents, their ability to care for children, their views and attitudes towards children and the discipline of children, and their own upbringing. (Ex. 9 (Green Dep.), at 41:20-42:14; Ex. 8 (Maca Dep.), at 19:25-22:17.)

76. The HHS screening process is effective in keeping out of the system potential parents who would be unsuitable. (Ex. 6 (Pristow 30(b)(6) Dep.), at 50:15-51:6; Ex. 7 (Winterer 30(b)(6) Dep.), at 52:8-17; Ex. 9 (Green Dep.), at 50:4-8.)

77. The HHS screening process will not approve applicants unless they have been determined to offer a safe, stable, healthy and loving family for a child. (Ex. 6 (Pristow 30(b)(6) Dep.), at 44:18-45:3; Ex. 9 (Green Dep.), at 41:5-42:14; Ex. 8 (Maca Dep.), at 120:14-121:7; Ex. 15 (Silverman Dep.), at 23:5-22; Ex. 13 (Spilde Dep.), at 24:24-25:12; Ex. 12 (Steuter Dep.), at 26:4-18.)

78. When married, opposite-sex couples apply to be foster parents, they are individually screened to assess the stability of their relationship. (Ex. 6 (Pristow 30(b)(6) Dep.), at 50:5-13.)

79. The best way to assess the stability of a relationship between any two people is an individualized assessment of that relationship rather than making a judgment based on categories of applicants. (Ex. 6 (Pristow 30(b)(6) Dep.), at 50:5-13; Ex. 7 (Winterer 30(b)(6) Dep.), at 111:22-112:2.)

80. In making placement decisions, HHS uses the "best interest of the child" standard. In determining whether a placement is in the best interest of the child, HHS looks at whether the home will meet the physical, mental, emotional, educational, social, and spiritual needs of the child; the home's geographic location (*e.g.*, keeping the child in the same school district, proximity to previous home); the other children in the household; the adequacy of the physical household itself; the ability of the foster parents to deal with the special needs, such as behavioral issues, of the child; and the emotional reaction of the child to the household. (Ex. 7

(Winterer 30(b)(6) Dep.), at 16:7-18:7; Ex. 9 (Green Dep.), at 58:18-59:6; Ex. 8 (Maca Dep.), at 44:12-45:9.)

81. When making a placement decision, HHS assesses the available options and makes the placement that is the best option for the child. (Ex. 7 (Winterer 30(b)(6) Dep.), at 80:3-81:1.)

82. The caseworker in the field is the best person to make the evaluation as to whether a child would be happy in a placement. (Ex. 7 (Winterer 30(b)(6) Dep.), at 18:18-19:1.)

83. When making placement decisions for foster care or adoption, HHS does not have a preference for married applicants over unmarried applicants and instead makes individualized decisions based on the best interests of the particular child. (Ex. 9 (Green Dep.), at 129:3-11.)

84. The best way to promote the best interest of a child in connection with a placement decision is to do a thorough individualized determination, taking into account the characteristics of a particular applicant and a particular child. (Ex. 7 (Winterer 30(b)(6) Dep.), at 76:7-13.)

85. HHS recognizes that, as with religion, a prospective foster parent's sexual orientation would only be relevant to a placement decision if it is relevant to the circumstances of a particular child. (Ex. 7 (Winterer 30(b)(6) Dep.), at 49:21-50:17, 61:15-21.)

86. The case worker and supervisor are competent to make a determination about a placement with a gay or lesbian person. (Ex. 6 (Pristow 30(b)(6) Dep.), at 24:21-25:13.)

H. Nebraska Has a Serious Need for More Foster and Adoptive Parents.

87. HHS has a serious need for additional foster and adoptive parents. (Ex. 6 (Pristow 30(b)(6) Dep.), at 45:4-9; Ex. 7 (Winterer 30(b)(6) Dep.), at 8:21-9:3; Ex. 11 (Bryceson Dep.), at 173:6-8; Ex. 10 (Busch Dep.), at 87:10-16; Ex. 9 (Green Dep.), at 28:6-9; Ex. 8 (Maca Dep.), at 10:5-16; Ex. 14 (Puls Dep.), at 65:18-20; Ex. 15 (Silverman Dep.), at 80:19-21, 82:5-

83:6; Ex. 13 (Spilde Dep.), at 111:14-16; Ex. 12 (Steuter Dep.), at 82:20-22; Ex. 16 (Stolz Dep.), at 240:11-19.)

88. As a result of HHS's need for additional foster and adoptive parents, some children in state custody will continue to have multiple temporary placements before a suitable permanent home is found; some children will continue to be separated from their siblings; some children will continue to be placed in emergency shelters or group homes; and some children will continue to be unable to be adopted at all and will instead reach the age of majority without ever being part of a permanent family. (Ex. 11 (Bryceson Dep.), at 173:9-174:17; Ex. 10 (Busch Dep.), at 87:18-88:21; Ex. 9 (Green Dep.), at 26:5-27:2, 28:23-30:12; Ex. 8 (Maca Dep.), at 10:3-17:22; Ex. 14 (Puls Dep.), at 65:21-67:6; Ex. 13 (Spilde Dep.), at 111:14-112:20; Ex. 12 (Steuter Dep.), at 82:20-83:23; Ex. 16 (Stolz Dep.), at 240:11-242:10.)

89. A June 15, 2013 report by Nebraska's Foster Care Review Office ("FCRO") recognized multiple deficiencies in the Nebraska foster care system and emphasized multiple areas of the foster care system "needing improvement," including that: (1) the "[l]ength of time between removal from the home and permanency remains an issue"; (2) "[t]he rate of re-entry into out-of-home care needs to be reduced"; and (3) "[t]he number of placement changes need[s] to be reduced." (Ex. 46 (Nebraska Foster Care Review Office Quarterly Report, dated June 15, 2013), at 2.)

90. From July 1, 2013 to June 30, 2014, 5,466 Nebraska children were in out-of-home care for some portion of their life. (Ex. 47 (Nebraska Foster Care Review Office Annual Report, dated Dec. 1, 2014), at 1 (specifying that out-of-home care includes "foster family homes, foster homes of relatives, group homes, emergency shelters. . . . [and] youth rehabilitation facilities").)

91. From July 1, 2013 to June 30, 2014, the average number of days Nebraska children had been in out-of-home care (excluding time during prior removals) was 416 days, with a median of 249 days. (Ex. 47 (Nebraska Foster Care Review Office Annual Report, dated Dec. 1, 2014), at 61.)

92. Of the 3,029 Nebraska children in out-of-home care as of June 30, 2014, 48% had been placed in out-of-home care for longer than a year, 23% had been in out-of-home care for longer than two years, and 12% had been in out-of-home care for longer than three years. (Ex. 47 (Nebraska Foster Care Review Office Annual Report, dated Dec. 1, 2014), at 60.)

93. As of June 30, 2014, 33% of the children in out-of-home care had been through four or more placements. (Ex. 47 (Nebraska Foster Care Review Office Annual Report, dated Dec. 1, 2014), at 91.)

94. Children who experience four or more out-of-home placements suffer permanent, negative consequences, including problems with attachments and lifelong trauma. (Ex. 8 (Maca Dep.), at 16:25-17:22; *see also* Ex. 47 (Nebraska Foster Care Review Office Annual Report, dated Dec. 1, 2014), at 89 ("National research indicates that children experiencing four or more placements over their lifetime are likely to be permanently damaged by the instability and trauma of broken attachments.").)

STANDARD OF REVIEW

Plaintiffs do not contest the applicable standard of review as stated by Defendants. (*See* Def. Br. at 5-6.) Plaintiffs only supplement the standard Defendants have provided as follows: First, "[s]ummary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law." *Neb. Accountability & Disclosure Commission* v. *Citizens for Responsible Judges*, 256 Neb. 95, 98 (1999). Second,

when parties cross-move for summary judgment, the "cross-motions must be considered separately" in determining if the movant satisfied its "burden of establishing that no genuine issue of material fact exists and that [it] is entitled to a judgment as a matter of law." 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2720 (3d ed.).[4] Finally, summary judgment is an appropriate remedy for constitutional claims. *See*, *e.g.*, *Citizens of Decatur for Equal Educ.* v. *Lyons-Decatur Sch. Dist.*, 274 Neb. 278 (2007) (affirming district court's grant of summary judgment relating to equal protection, procedural due process, and substantive due process claims).

ARGUMENT

Because HHS's unequal treatment of gay and lesbian individuals and couples burdens the rights of those individuals and couples to exercise their right to maintain intimate relationships protected by substantive due process and constitutes discrimination based on sexual orientation, it must be subjected to heightened judicial review. However, such differential treatment cannot survive any level of constitutional scrutiny because, as Defendants admit, it does not serve any child welfare interest or any other state interest and, in fact, harms the very children HHS is charged with protecting.

I. HHS SUBJECTS LESBIAN AND GAY INDIVIDUALS AND COUPLES TO UNEQUAL TREATMENT BASED ON THEIR SEXUAL ORIENTATION AND INTIMATE RELATIONSHIPS.

Defendants claim that "gay and lesbian applicants are treated by []HHS exactly the same way as heterosexual applicants." (Def. Br. at 9.) However, the record evidence indisputably shows that under HHS's current Policy, lesbian and gay individuals and couples are

[4] Nebraska "look[s] to other courts for guidance in applying [its] rules of civil procedure[,] which are based on the federal rules." *Tymar, LLC* v. *Two Men & a Truck*, 282 Neb. 692, 703 (2011) (looking to Wright & Miller for guidance).

categorically ineligible to foster or adopt children in state custody. (SOF ¶¶ 16-18.) This Policy is so problematic that Defendants do not even attempt to defend it. Instead, Defendants attempt to cure the unconstitutionality of the Policy by claiming that the Pristow Procedure that HHS has used to grant some exceptions to the categorical bar is the current practice. However, that is not equal treatment. (Def. Br. at 6-7.) There can be no question based on the record that HHS subjects lesbian and gay individuals and couples to unequal treatment based on their sexual orientation and intimate relationships.

First, the Pristow Procedure, even if it were uniformly applied and made known to the public, subjects gay and lesbian individuals to a separate and more onerous process of review than heterosexuals, including those heterosexual individuals with past felony convictions. (SOF ¶¶ 29-30, 32-35.) Under this procedure, lesbian and gay applicants must pass five tiers of review, which includes the Director. This is more than the two tiers required for married heterosexual couples and single heterosexuals, and the four tiers required for unmarried heterosexual couples and individuals with past felony convictions (other than convictions for disqualifying crimes). (*Id.*) This special review process on its face treats gay and lesbian applicants differently from heterosexual applicants. The differential treatment is not only more onerous for gay and lesbian individuals and couples, it also stigmatizes them by sending the message that, in the eyes of the State, they are inherently less qualified to be parents. The extra tiers of review that gay and lesbian applicants are subjected to under the Pristow Procedure put the lie to Defendants' assertion that gay and lesbian applicants are "not being treated any differently" from heterosexual applicants. (Def. Br. at 9.) Further, "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community

can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler* v. *Mathews*, 465 U.S. 728, 739-40 (1984) (quoting *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 (1982)).

Second, the Policy, which categorically bars gay and lesbian individuals and couples from being considered to foster or adopt children in state custody, has not been rescinded and is still the formal policy of HHS. (SOF ¶¶ 38-43.) Although Defendants maintain that exceptions were made to the Policy under former Director Pristow, Defendants have admitted that the Policy remains active and not rescinded (SOF ¶ 39), the Policy remained on the HHS website until February 2015 and is not included on the HHS webpage listing rescinded policies (SOF ¶¶ 41-42), and the Policy has continued to be referenced or included in training materials provided to HHS staff (SOF ¶¶ 44-52).

Third, the Pristow Procedure has never been put in writing or systematically communicated to HHS staff or contract agencies. It was communicated verbally by Director Pristow to a small number of HHS officials. The confusion sown by HHS's refusal to formally rescind the Policy or even commit the Pristow Procedure to writing has led to a bimodal practice, with some staff proceeding as if the Policy remains in force, and others applying the Pristow Procedure. And, there has been no systematic effort to inform contract agency personnel of the Pristow Procedure, so some contract agency personnel are not aware that lesbian and gay individuals and couples can be considered. Thus, even after Director Pristow verbally informed some of his staff of the Pristow Procedure, some staff and contract agency personnel continue to apply the Policy and turn away lesbian and gay individuals and couples outright. (SOF ¶¶ 53-54.) Indeed, when Plaintiffs Greg and Stillman Stewart contacted HHS in October of 2012 (after

Director Pristow established the Pristow Procedure) to apply to become foster parents, they were told they were ineligible because they are a same-sex couple. (SOF ¶ 54.)

Fourth, the Pristow Procedure has never been disseminated to the public, so lesbian and gay people interested in fostering or adopting children in state custody have no basis to know that they can be considered even in light of the existence of a Policy that declares them categorically ineligible. (SOF ¶¶ 41-43, 65-67.)

Accordingly, despite allegations of a new practice and equality of treatment, HHS continues to subject gay and lesbian applicants to unequal treatment on the basis of their sexual orientation and the exercise of their right to intimate association protected by substantive due process. Plaintiffs and Defendants are in manifest agreement that gay and lesbian applicants should be "treated by []HHS exactly the same way as heterosexual applicants." (Def. Br. at 6.) But equality of treatment is not present. Plaintiffs simply ask this Court to hold Defendants to their word—to subject gay and lesbian applicants to the same process as everyone else—and nothing more.

II. HHS'S UNEQUAL TREATMENT OF LESBIAN AND GAY INDIVIDUALS AND COUPLES MUST BE EVALUATED UNDER HEIGHTENED SCRUTINY.

HHS's unequal treatment of lesbian and gay individuals and couples must be subjected to heightened scrutiny for two independent reasons: *first*, the unequal treatment burdens lesbian and gay individuals and couples' substantive due process right to maintain intimate relationships; and *second*, the unequal treatment constitutes discrimination based on sexual orientation and sexual orientation classifications are at least quasi-suspect.

A. Heightened Scrutiny Is Triggered Because HHS's Unequal Treatment of Lesbian and Gay Individuals and Couples Burdens Their Right to Maintain Intimate Relationships Protected by Substantive Due Process.

The Supreme Court repeatedly has held that when the government penalizes individuals—including by withholding a benefit—for exercising a fundamental right or liberty interest protected by the Due Process Clause, that penalization constitutes a burden on the right and requires the application of heightened scrutiny. *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969) ("[A]ny classification which serves to penalize the exercise of [a constitutional right], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional"); *see also, e.g., Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 640, 648 (1974) (denying employment to a teacher because she became pregnant violated fundamental right to procreate); *Mem'l Hosp.* v. *Maricopa Cnty.*, 415 U.S. 250, 257-58 (1974) (denying eligibility for free non-emergency hospital or medical care to individuals who moved to the state less than a year ago violated fundamental right to interstate travel).

This Court noted in denying Defendants' motion to dismiss that "the right to intimate association has been recognized as a fundamental liberty because of the 'role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.'" (Order on Defendants' Motion to Dismiss, dated Apr. 24, 2014 ("Mot. Dismiss Op."), at 11 (citing *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 617-19 (1984)).) This Court likewise recognized that "the fundamental right to privacy encompasses a person's right to enter into a homosexual relationship." (Mot. Dismiss Op. at 11 (citing *Lawrence* v. *Texas*, 539 U.S. 558 (2003)).)[5]

[5] The Supreme Court once referred to this right as the right to privacy, nomenclature also used by the Nebraska Supreme Court and other courts. In recent years, the Supreme Court has favored other terminology, specifically "autonomy," *see, e.g.*, *Lawrence*, 539 U.S. at 574;

(continued . . .)

Accordingly, any burden HHS imposes on this fundamental right or liberty interest must be subjected to heightened scrutiny, which requires the State to justify the intrusion on the right by at least an important government interest. *Griswold* v. *Connecticut*, 381 U.S. 479, 503-04 (1965); *Lawrence*, 539 U.S. at 578; *In re Guardianship of D.J.*, 268 Neb. 239, 246 (2004).

As the undisputed evidence establishes, and true to the allegations this Court has already accepted as stating a claim (Mot. Dismiss Op. at 11), the Policy impermissibly burdens Plaintiffs' due process rights. Under the express terms of the Policy, Plaintiffs "cannot both assert their rights to intimate association and privacy and remain eligible to receive a foster care license and adopt state wards." (*Id.*); *see also Ark. Dep't of Human Servs.* v. *Cole*, 380 S.W.3d 429 (Ark. 2011) (law prohibiting adoption or fostering by individuals cohabiting with unmarried partner penalized exercise of right to intimate association). Indeed, the Policy's exclusion of (1) "persons who identify themselves as homosexuals" and (2) persons who are "unrelated, unmarried adults residing together" would require, at a minimum, that Plaintiffs end their domestic relationships with their partners in order to be eligible for consideration as foster parents. (SOF ¶ 16.) Further, as lesbian and gay people, plaintiffs would have to forego any intimate relationship so as not to "identify themselves as homosexuals" in order to be offered the same consideration as heterosexual applicants to be foster or adoptive parents. (SOF ¶¶ 16-18, 30, 32-35.)

(. . . continued)
Planned Parenthood of Se. Pa. v. *Casey*, 505 U.S. 833, 851 (1992), though it is the same protected right and encompasses the right to have intimate relationships. Additionally, the Nebraska Supreme Court has concluded that, "[i]n the context of a right to privacy, we have effectively stated that the due process provision of the Nebraska Constitution is congruent with the federal Constitution." *Hamit* v. *Hamit*, 271 Neb. 659, 672 (2006).

Therefore, the indisputable effect of HHS's treatment of gay and lesbian individuals is the same as that the Supreme Court of Arkansas recognized in striking down a state statute that prohibited unmarried, cohabitating individuals from adopting or serving as foster parents. *Cole*, 380 S.W.3d at 443. In rejecting the State's argument that the exclusion did not burden the fundamental rights or liberty interests of the plaintiffs, the court found that the law forced plaintiffs to make the "dramatic" choice to either "lead a life of private, sexual intimacy with a partner without the opportunity to adopt or foster children" or to "forego sexual cohabitation, and, thereby, attain eligibility to adopt or foster." *Id*. at 435-46. Because the court found that the law burdened the right to privacy, it applied heightened scrutiny. *Id*. at 437. Here, as in *Cole*, the Policy conditions Plaintiffs' eligibility to be considered as foster or adoptive parents on foregoing their fundamental, or otherwise constitutionally protected, substantive due process right to maintain intimate personal relationships. Even in cases in which the Pristow Procedure is applied, subjecting lesbian and gay individuals and couples to this more onerous review process still constitutes a penalty for exercising their right to intimate association and thus triggers heightened scrutiny.

Because HHS's unequal treatment of lesbian and gay individuals and couples intrudes on the right to intimate association, heightened scrutiny is warranted. However, as discussed in Section III, *infra*, this treatment cannot withstand even rational basis review, let alone the heightened scrutiny required.

B. Heightened Scrutiny Is Triggered Because HHS's Unequal Treatment of Lesbian and Gay Individuals and Couples Classifies on the Basis of Sexual Orientation and Such Classifications Are at Least Quasi-Suspect.

In evaluating equal protection claims, government actions that classify along suspect lines are subject to heightened scrutiny. *See, e.g., San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 17 (1973); *State* v. *Kubik*, 235 Neb. 612, 615 (1990).[6]

Here, lesbian and gay individuals and couples are subjected to unequal treatment based on their sexual orientation.[7] Heightened equal protection scrutiny is warranted because classifications based on sexual orientation are at least quasi-suspect.

The Supreme Court has identified four considerations that courts should analyze when determining whether a classification should be treated as "suspect" or "quasi-suspect." The two essential factors for consideration are whether the group has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society," *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 440-41 (1985), and whether the group has been historically "subjected to discrimination," *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987). Courts

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[6] The scope of the equal protection rights offered under the United States and Nebraska Constitutions are the same. U.S. Const. amend. XIV, § 1; Neb. Const. Art. I, § 3; *see also Keller* v. *City of Fremont*, 280 Neb. 788, 791 (2010) ("We have interpreted the Nebraska Constitution's due process and equal protection clauses to afford protections coextensive to those of the federal Constitution.").

[7] "[T]he Equal Protection Clause requires the government to treat *similarly situated* people alike." (Mot. Dismiss Op. at 9 (emphasis added) (quoting *State* v. *Atkins*, 250 Neb. 315, 320 (1996)).) "The initial inquiry in an equal protection analysis is whether the plaintiff has demonstrated that he or she was treated differently than others who are similarly situated." (*Id.* (quoting *Atkins*, 250 Neb. at 320).) The undisputed evidence establishes that Plaintiffs are similarly situated to heterosexual foster and adoptive care applicants, a fact that Defendants do not contest in their brief, have admitted in discovery, and have acknowledged by making limited placements with same-sex individuals and couples. (SOF ¶¶ 22-26, 68.)

may also consider whether the class exhibits "obvious, immutable,[8] or distinguishing characteristics that define them as a discrete group," and whether it is "a minority or politically powerless," *Bowen*, 483 U.S. at 602, although these latter two, while "indicative," are secondary and non-essential considerations, *Windsor*, 699 F.3d at 181 (noting that "[i]mmutability and lack of political power are not strictly necessary factors to identify a suspect class" and collecting cases).

Numerous federal and state courts have recognized that sexual orientation classifications are at least quasi-suspect, and thus trigger heightened scrutiny.[9] The traditional factors for deciding whether a classification is suspect support this result. As the Second Circuit

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[8] There is no requirement that a characteristic be immutable in a literal sense in order to trigger heightened scrutiny. Heightened scrutiny applies to classifications based on alienage and "illegitimacy," even though "[a]lienage and illegitimacy are actually subject to change." *Windsor* v. *United States*, 699 F.3d 169, 183 n.4 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013); *see also Nyquist* v. *Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was mutable). But even if literal immutability were required, there is now broad medical and scientific consensus that sexual orientation cannot be intentionally changed through conscious decision, therapeutic intervention, or any other method. Under any definition of immutability, sexual orientation clearly qualifies. *See Baskin* v. *Bogan*, 766 F.3d 648, 658 (7th Cir. 2014) ("[T]here is little doubt that sexual orientation, the ground of the discrimination, is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice."); *Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 966 (N.D. Cal. 2010), *appeal dismissed sub nom. Perry* v. *Brown*, 725 F.3d 1140 (9th Cir. 2013) ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation."); *accord Pedersen* v. *Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 320-24 (D. Conn. 2012).

[9] *See Baskin*, 766 F.3d at 655-56; *Windsor*, 699 F.3d at 181; *Campaign for S. Equality* v. *Bryant*, 2014 WL 6680570, at *15-28 (S.D. Miss. Nov. 25, 2014); *Whitewood* v. *Wolf*, 992 F. Supp. 2d 410, 426-30 (M.D. Pa. 2014); *Love* v. *Beshear*, 989 F. Supp. 2d 536, 547 (W.D. Ky. 2014); *Wolf* v. *Walker*, 986 F. Supp. 2d 982, 1009-14 (W.D. Wis. 2014); *Golinski* v. *U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-90 (N.D. Cal. 2012); *Pedersen*, 881 F. Supp. 2d at 310-33; *Perry*, 704 F. Supp. 2d at 997; *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011) (decision of 20 bankruptcy judges); *Griego* v. *Oliver*, 316 P.3d 865, 879-84 (N.M. 2013); *Varnum* v. *Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008); *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407, 425-32 (Conn. 2008); *see also SmithKline Beecham Corp.* v. *Abbott Labs.*, 740 F.3d 471, 489 (9th Cir. 2014).

recently held, "[i]t is *easy* to conclude that homosexuals have suffered a history of discrimination," and sexual orientation does not bear a "relation to ability to perform or contribute to society." *Windsor*, 699 F.3d at 182 (emphasis added) (internal quotation marks omitted); *see also Baskin*, 766 F.3d at 664-65 (noting long history of discrimination targeting gay and lesbian people). Though not essential to finding a suspect classification, sexual orientation is also an obvious, immutable or distinguishing characteristic. *See Windsor*, 699 F.3d at 183 (noting that there is no doubt that sexual orientation is a distinguishing characteristic that invites "discrimination when it is manifest"). *Finally*, though lack of political power is also not essential for recognition as a suspect or quasi-suspect class, *id.* at 184-85, the limited ability of lesbian, gay, and bisexual people as a group to protect themselves in the political process also weighs in favor of heightened scrutiny of laws that discriminate based on sexual orientation. *See id.*; *Baskin*, 766 F.3d at 671. In sum, sexual orientation classifications demand heightened equal protection scrutiny not just under the two essential considerations, but under all four considerations the Supreme Court has used to identify suspect and quasi-suspect classifications.

Where heightened scrutiny is warranted, as it is here, the party seeking to uphold government action that classifies along suspect lines bears the burden of demonstrating at least an "exceedingly persuasive justification" for the classification, by showing that it is "substantially related" to an "important" government interest. *Miss. Univ. for Women*, 458 U.S. at 724 (gender classification). As discussed in Section III, *infra*, the unequal treatment of lesbian and gay individuals and couples cannot survive any level of constitutional scrutiny.

III. HHS'S UNEQUAL TREATMENT OF LESBIAN AND GAY INDIVIDUALS AND COUPLES FAILS ANY LEVEL OF CONSTITUTIONAL SCRUTINY.

HHS's unequal treatment of lesbian and gay individuals and couples seeking to foster or adopt cannot withstand even rational basis review. Under rational basis review, policies

"will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440; *see also Gourley ex rel. Gourley* v. *Neb. Methodist Health Sys.*, 265 Neb. 918, 947-48 (2003). While heightened scrutiny is warranted for the reasons stated in Section II above, Defendants cannot provide *even one* legitimate government interest—nor does one exist—to justify the unequal treatment of lesbian and gay individuals and couples by the Policy and the Pristow Procedure, and they concede there is none. Here, the undisputed facts, including the Rule 30(b)(6) deposition testimony of HHS and CFS, establish that there is no rational basis for categorically excluding lesbian and gay individuals and couples from fostering or adopting or subjecting such applicants to a more onerous approval process.

A. Defendants Have Identified No Legitimate Government Interest to Justify the Unequal Treatment.

It is telling that in their summary judgment motion, Defendants have not provided *even one* rationale for the Policy or the Pristow Procedure. Defendants have instead chosen to claim that Administrative Memo #1-95 is "no longer the policy of []HHS." (Def. Br. at 6.) By doing so, Defendants are clearly attempting to avoid the daunting task of articulating a legitimate government interest that would justify the exclusion or greater scrutiny of lesbian and gay individuals and couples seeking to foster and adopt children. By claiming that lesbian and gay applicants are treated the same as other applicants, Defendants tacitly acknowledge that differential treatment of lesbian and gay applicants has no rational basis. Indeed, Defendants' position is unsurprising since, as demonstrated below and as confirmed in the record, there is no legitimate state interest available to them to justify the unequal treatment.

B. No Child Welfare Interest Nor Any Other State Interest Is Rationally Furthered by the Unequal Treatment of Lesbian and Gay Applicants.

1. Defendants Admit That There Is No Child Welfare Basis or Other State Interest Served by the Unequal Treatment.

HHS admits that no child welfare interest or any other state interest is advanced by treating gay and lesbian persons differently in decisions regarding licensing or placement in foster or adoptive homes. (SOF ¶¶ 19-21.) HHS staff testified that the Policy does not promote or protect the well-being of children in any way and no child welfare interest is served by treating lesbian and gay individuals and couples differently from heterosexual individuals. (SOF ¶ 27.)

HHS admitted that there is no state interest served by the more burdensome approval process imposed on gay and lesbian applicants by the Pristow Procedure. (SOF ¶¶ 19-21.) Indeed, it agreed that "nothing is advanced" by having a separate process for gay and lesbian applicants. (SOF ¶ 21.)

HHS further admitted that a person's sexual orientation is irrelevant to whether they would make a suitable foster or adoptive parent, that gay and lesbian persons can be equally suitable foster and adoptive parents as heterosexuals, and that there is no difference about the nature of a person who identifies as a lesbian or gay that suggests that a person should be treated differently from a heterosexual person in licensing or placement of a child in a foster or adoptive home. (SOF ¶¶ 22-23.) Furthermore, there is a consensus in the scientific literature that there is no difference in outcomes for children placed with same-sex couples as compared with children

placed with heterosexual couples. HHS is aware of and has no basis to disagree with that research.[10] (SOF ¶ 24-25.)

HHS's willingness to place children with gay and lesbian families further demonstrates that there is no rational basis for treating gay and lesbian individuals differently in the foster care and adoption placement process. Since July 2013, HHS has placed at least 15 children with lesbian and gay individuals or couples. (SOF ¶ 68.) And, in each of these cases, HHS necessarily determined that the placement was in the best interest of the child. (SOF ¶¶ 26, 80-81.)

Given that HHS admits that gay and heterosexual individuals and couples make equally good foster and adoptive parents, and that no child welfare interest is advanced by treating gay and lesbian individuals and couples differently from other applicants to foster or adopt, the practice of subjecting gay and lesbian families to a more burdensome approval process or barring them from consideration outright under the Policy is not rationally related to any legitimate government interest. *See Snyder* v. *IBP Inc.*, 229 Neb. 224, 227 (1998) (under rational

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[10] Numerous courts that have reviewed the relevant research have agreed that there is a scientific consensus that children of same-sex and different-sex parents fare equally well. *See Perry*, 704 F. Supp. 2d at 980 (finding that the research supporting the conclusion that "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted" is "accepted beyond serious debate in the field of developmental psychology"); *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008) ("[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption."), *aff'd sub nom.*, *Fla. Dep't of Children & Families* v. *Adoption of X.X.G.*, 45 So.3d 79 (Fla. Dist. Ct. App. 2010); *Howard* v. *Child Welfare Agency Rev. Bd.*, 2004 WL 3154530, at *9 (Ark. Cir. Ct. Dec. 29, 2004) (citing *Howard* v. *Child Welfare Agency Rev. Bd.*, 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004)) (holding based on factual findings regarding the well-being of children of gay parents that "there was no rational relationship between the [exclusion of gay people as foster parents] and the health, safety, and welfare of the foster children"), *aff'd sub nom.*, *Dep't of Human Servs.* v. *Howard*, 238 S.W.3d 1 (Ark. 2006). Even HHS acknowledges this scientific consensus. (SOF ¶ 25.)

basis review, "the classification must rest upon real differences of situations and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment"); *Heller* v. *Doe*, 509 U.S. 312, 321 (1993) (even under rational basis review, the justification must have a "footing in . . . realit[y]"); *Romer* v. *Evans*, 517 U.S. 620, 635 (1996) (under rational basis review, there must be a "factual context from which [to] discern a relationship to legitimate state interests").

2. HHS Admits That the Standard Individual Screening Process Is Equally Effective for Gay and Lesbian Individuals and Couples.

The standard HHS screening process is effective at keeping unsuitable parents out of the foster and adoptive care system. (SOF ¶ 76.) As noted above, to obtain a foster care license, potential adoptive parents submit to rigorous scrutiny, including a criminal evaluation, fingerprinting and a sexual abuse registry check, a training program, and an in-depth home study that includes a home walk-through and a formal interview. (SOF ¶¶ 74-75.) HHS staff apply the "best interest of the child" standard in making placement decisions, taking into account a multitude of critical factors such as whether the home will meet the physical, mental, emotional, educational, social, and spiritual needs of the child. (SOF ¶ 80.)

This rigorous screening process already serves to determine whether applicants would be suitable foster parents and is equally effective for gay and lesbian applicants. (SOF ¶¶ 71-72, 76-77.) Under precedent from both the United States and Nebraska Supreme Courts, the fact that HHS already has a strong system in place to screen potential parents precludes reliance on an asserted interest in screening out unsuitable foster and adoptive parents. *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 536-37 (1973) (in striking down exclusion of unrelated household members from food stamp eligibility under rational basis review, Court rejected asserted interest in preventing fraud, reasoning that the existence of fraud prevention provisions

in the law "casts considerable doubt upon the proposition that [the challenged law] could rationally have been intended to prevent those very same abuses"); *Snyder*, 229 Neb. at 228 (striking down a workers' compensation law that barred modifications of awards that are payable in six months or less, reasoning that the asserted interest in having a "time limit to bar proceedings to reopen ancient awards is solved largely by the statute of limitations applicable to proceedings to modify an award"). Indeed, HHS and its employees readily admit that lesbian and gay applicants can be effectively screened for suitability to foster through the same screening process that HHS applies to heterosexual applicants. (SOF ¶¶ 71-72.) As such, there would be no harm to children if gay and lesbian individuals and couples were subject to the normal placement process rather than receiving extra levels of review or being barred outright. (SOF ¶ 73.) Furthermore, HHS agrees that the best way to promote the best interest of a child in connection with a placement decision is to do so through individualized determinations. (SOF ¶¶ 79, 83-84.)

Thus, the existence of an individualized screening process that serves to weed out unsuitable foster and adoptive parents "casts considerable doubt upon the proposition"—one that is not even advanced by the State here—that the Policy was enacted to serve the "very same" purpose. *Moreno*, 413 U.S. at 537. The unequal treatment of lesbian and gay individuals and couples does not serve a goal of ensuring that children are placed with appropriate foster and adoptive parents. Rather, the continuation of unequal treatment of lesbian and gay individuals and couples serves only to exclude people who *would* make good parents.

3. HHS's Unequal Treatment of Lesbian and Gay Individuals and Couples Exacerbates Nebraska's Shortage of Foster and Adoptive Homes and Directly Harm Children as a Result.

Not only does HHS's unequal treatment of lesbian and gay individuals and couples further no child welfare interest, but also it *works against* Nebraska's interest in the well-

being of children in State custody by unnecessarily limiting the families available to care for them.

It is undisputed that Nebraska has a serious need for more foster and adoptive parents. (SOF ¶ 87.) As a result of this shortage of parents, children suffer. Some have multiple temporary placements before a suitable permanent home is found; some are separated from their siblings; some are placed in foster families far from their schools and communities; some are placed in emergency shelters or group homes rather than with a family; and some are unable to ever be adopted and will instead reach the age of majority without ever being part of a permanent family. (SOF ¶ 88.)

The consequences of this shortage of foster and adoptive parents comes at a devastating cost. As reported by Nebraska's Foster Care Review Office (FCRO), of the 3,029 Nebraska children in out-of-home care as of June 30, 2014, 48% had been placed in out-of-home care for longer than a year, 23% had been in out-of-home care for longer than two years, and 12% had been in out-of-home care for longer than three years. (SOF ¶ 92.) As of June 30, 2014, 33% of the children in out-of-home care had been through four or more placements. (SOF ¶ 93.) Children who experience four or more out-of-home placements suffer permanent, negative consequences, including problems with attachments and lifelong trauma. (SOF ¶ 94.)

Nebraska cannot afford to lose potential families by retaining a Policy that publicly tells lesbian and gay individuals and couples that they are not eligible to be considered as foster or adoptive parents. HHS agrees that a policy that discourages lesbian and gay individuals and couples from applying to foster or adopt is contrary to the goals of HHS and contrary to the best interest of children in its custody. (SOF ¶ 28.) HHS further recognizes that the Policy is a barrier to families becoming foster parents. (SOF ¶ 64.) Indeed, the Policy

remained on the HHS website until February 2015, and former Director Pristow's decision to permit placements with lesbian and gay individuals and couples subject to his personal approval has never been communicated to the public. (SOF ¶¶ 65-67.) While HHS made 15 placements with lesbian or gay individuals or couples from July 2013 through August 2014, all but three were individuals who already had a prior kinship relationship with the child and, thus, presumably were identified as part of the child's casework. (SOF ¶ 68.)

Nebraskans would only benefit by removing the barriers to lesbian and gay individuals and couples fostering and adopting children. Indeed, Nebraska is the only state that expressly bans gay people from serving as foster parents. (Ex. 48 (*Foster and Adoption Laws*, Movement Advancement Project, Feb. 25, 2015).)

* * * *

The undisputed evidence shows the lack of any rational basis for HHS's unequal treatment of gay and lesbian individuals and couples and, thus, that this treatment cannot satisfy rational basis review, let alone the heightened scrutiny that is warranted here. The Policy, along with Director Pristow's separate approval process for gay and lesbian applicants, "is a status-based enactment divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake . . . ." *Romer*, 517 U.S. at 635. HHS's choice to maintain a Policy that has no state interest at the expense of children's welfare is arbitrary, irrational, and lacking any plausible policy reason for its discriminatory treatment of loving gay and lesbian families ready to welcome children into their home.

CONCLUSION

For all the foregoing reasons, the Court should grant summary judgment in favor of Plaintiffs, deny Defendants' motion for summary judgment, and enter an order awarding the relief requested in Plaintiffs' Complaint and Praecipe.

Dated this 6th day of March, 2015.

Respectfully submitted,

/s/ Amy A. Miller
Amy A. Miller, #21050
ACLU Nebraska Foundation, Inc.
941 O Street, Suite 706
Lincoln, Nebraska 68508
Phone: (402) 476-8091
Facsimile: (402) 476-8135
amiller@aclunebraska.org

Leslie Cooper
Chase Strangio
James D. Esseks
ACLU Foundation, Inc.
125 Broad Street, 18th Floor
New York, New York 10004
Phone: (212) 549-2500
Facsimile: (212) 549-2646
lcooper@aclu.org
cstrangio@aclu.org
jesseks@aclu.org
(admitted *pro hac vice*)

Garrard R. Beeney / ACG
Garrard R. Beeney
Andrew C. Gilman
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Facsimile: (212) 558-9007
beeneyg@sullcrom.com
gilmana@sullcrom.com
(admitted *pro hac vice*)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 6, 2015, a true and accurate copy of the foregoing Notice was served on Defendants herein by United States Mail, first-class postage prepaid, and e-mail addressed to their attorney of record:

Jessica Forch, Assistant Attorney General
(jessica.forch@nebraska.gov)
Nebraska Attorney General's Office
2115 State Capitol
Lincoln, Nebraska 68509.

Andrew C. Gilman